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Yorker Sdn Bhd v Pt Mayora Indah

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HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22 NCVC-665–09 OF 2012
VARGHESE GEORGE J
14 MARCH 2013

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Civil Procedure — Injunction — Injunction to restrain — Injunction to restrain calling of bank guarantee payment — Whether unconscionable conduct on part of beneficiary established — Whether bank can accept documents presented in support of demand on bank guarantee on its face value without further investigation — Commercial contract

D

Civil Procedure — Injunction — Interim injunction — Affidavit evidence — Ex parte injunction granted — Whether further affidavit evidence admissible at inter parte stage

E

Contract — Guarantee — Bank guarantee — Construction — Conditional or unconditional guarantee — Bank guarantee guaranteeing payment in event of breach of warranty — Claims required to be supported by surveyor report — Whether bank guarantee was 'on demand' or unconditional guarantee

F

Contract — Guarantee — Bank guarantee — Injunction to restrain calling of bank guarantee payment — Whether unconscionable conduct on part of beneficiary established — Whether bank can accept documents presented in support of demand on bank guarantee on its face value without further investigation — Commercial consideration in allowing beneficiary to enforce bank guarantee to prevail

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The plaintiff had supplied and commissioned for the defendant two units of Spray Drying Plant ('the equipment'). HSBC Malaysia Bhd ('HSBC') had issued in favour of the defendant a bank guarantee ('BG') to guarantee payment in the event of any breach of process warranty and mechanical warranty ('the warranties'). The BG provided that any claim made for breach of warranty must be supported by either a surveyor report issued by a surveyor who is recognised worldwide or a mutually agreed letter signed by both the customer and the beneficiary to substantiate the claim. The defendant by a letter dated 24 Augut 2012 made a demand on HSBC for the whole of the guaranteed sum. The defendant together with that demand submitted an SGS inspection report dated 6 August 2012. This inspection report made reference to an explosion which had occurred on 25 June 2012 involving the equipment.

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The report did not advert to any breach or non-fulfillment of the warranties. By encl 6, the plaintiff applied for orders restraining the defendant from enforcing or encashing the BG. The plaintiff obtained an ex parte order restraining the defendant in the interim from receiving the guaranteed sum until the inter parte disposal of encl 6. Before the date fixed for the inter parte disposal of encl 6, the defendant submitted a revised SGS Inspection report, which made reference to the non-fulfillment of the warranties. The plaintiff contended that the BG should be construed as a 'conditional guarantee' and in this respect, it was argued, that the demand made by the Defendant on HSBC on 24 August 2012 had not satisfied the specific condition required for any payment to be made thereunder since the SGS inspection report submitted together had not adverted to any breach of the warranties. The plaintiff argued that the court should wholly disregard the revised inspection report.

Held, allowing the application:

(1) At the inter parte stage of dealing with encl 6, the court had to address the situation as it stood then. Both parties were at liberty to and had in the interim filed affidavits on further material to be taken note of by the court. The court was therefore not constrained from taking into consideration the contents of the revised inspection report (see para 17).

(2) Conventionally bank guarantees or performance bonds are categorised as either 'on demand unconditional' guarantee or 'conditional' guarantee. The former imposes an obligation on the guarantor to pay upon a demand being made without proof of any default in the underlying contract. In the latter, usually some event or events have to happen before a valid demand could be even made to impose an obligation on the guarantor to effect payment under the terms of the guarantee/performance bond. The answer as to whether a given legal instrument claimed to be in the nature of a guarantee, bond or indemnity falls into one of these two categories has to be determined from the words employed within the document itself. The conclusion to be drawn from those expressed terms have also to give regard to the particular practical context as well as the commercial purpose (see paras 19–21).

(3) A requirement to produce a certificate or report with a demand does not necessarily make that type of guarantee a 'conditional guarantee'. There is room for a guarantee to be still an on demand guarantee even if the demand is required to be supported by a certificate or report (see paras 23 & 27).

(4) From the language, tenor and terms used or expressed in the BG, it was the clear intention of the parties that the BG was to have the effect and operate as an on demand guarantee (see para 28).

(5) Following the tests postulated in *Sumatec Engineering and Construction*

Sdn Bhd v Malaysian Refining Co Sdn Bhd [2012] 3 CLJ 401, the threshold or evidentiary level of proof required to be met by the Plaintiff to avail of the exceptions of either fraud or unconscionability, to enable the plaintiff to sustain any restraining order on the defendant to receive the guaranteed sum from HSBC under the terms of the BG, was indeed a very high one (see para 35).

(6) Since the revised inspection report produced by the defendant was an SGS Report and referred specifically to breach of the warranties, there was compliance with the terms of the BG for payment to be effected. HSBC was perfectly entitled to treat the document presented in support of the demand on the BG, on its face value without any obligation to undertake any further investigation (see para 41).

(7) The facts and material placed before the court here were not sufficient to displace the commercial consideration that required the purpose of the BG to be upheld and the defendant's right to enforce or encash it, to prevail (see para 42).

[Bahasa Malaysia summary

Plaintif telah membekalkan dan mengkomisyenkan kepada defendan dua unit Spray Drying Plant ('peralatan tersebut'). HSBC Malaysia Sdn Bhd ('HSBC') telah mengeluarkan satu jaminan bank ('BG') kepada defendan untuk menjamin bayaran tersebut jika berlakunya kemungkiran waranti proses dan mesin ('waranti-waranti tersebut'). BG memperuntukkan bahawa apa-apa tuntutan yang dibuat terhadap kemungkiran waranti mestilah disokong oleh sama ada laporan juruukur yang diiktiraf seluruh dunia atau surat yang disetujui bersama ditandatangani oleh kedua-dua pelanggan dan benefisiari untuk menyokong tuntutan tersebut. Defendan, menerusi surat bertarikh 24 Ogos 2012 membuat tuntutan terhadap HSBC bagi kesemua jumlah yang dijamin. Bersama-sama dengan tuntutan tersebut, defendan mengemukakan laporan pemeriksaan SGS bertarikh 6 Ogos 2012. Laporan pemeriksaan ini membuat rujukan kepada letupan yang berlaku pada 25 Jun 2012 melibatkan peralatan tersebut. Laporan tersebut tidak memperihalkan apa-apa kemungkiran atau ketidakpatuhan waranti-waranti tersebut. Menerusi lampiran 6, plaintif memohon bagi perintah-perintah menghalang defendan daripada menguatkuasakan BG tersebut. Plaintif mendapatkan perintah ex parte untuk menghalang defendan dalam interim daripada menerima jumlah yang dijamin hinggalah pelupusan inter parte lampiran 6. Sebelum tarikh bagi pelupusan inter parte lampiran 6 ditetapkan, defendan mengemukakan laporan pemeriksaan SGS yang telah disemak semula, yang mana membuat rujukan kepada ketidakpenuhan waranti-waranti. Plaintif menghujahkan bahawa BG sepatutnya ditafsirkan sebagai 'jaminan bersyarat' dan berkenaan ini, dihujahkan bahawa tuntutan yang dibuat oleh defendan ke atas HSBC pada 24 Ogos 2012 tidak memenuhi syarat spesifik yang diperlukan bagi bayaran dibuat di bawahnya memandangkan laporan pemeriksaan SMS

dikemukakan bersama tidak menyatakan apa-apa kemungkiran waranti. Plaintif menghujahkan bahawa mahkamah tidak sewajarnya menimbangkan laporan pemeriksaan yang telah disemak semula.

Diputuskan, membenarkan permohonan:

(1) Di peringkat inter parte urusan dengan lampiran 6, mahkamah perlu melihat pada situasi ketika itu. Kedua-dua pihak bebas dan telah, dalam interim memfailkan afidavit-afidavit mengenai material lanjut yang perlu diambil perhatian oleh mahkamah. Mahkamah tidak terhalang daripada mempertimbangkan kandungan-kandungan laporan pemeriksaan yang telah disemak semula (lihat perenggan 17).

(2) Secara konvensionalnya, jaminan bank atau bon-bon pelaksanaan dikategorikan sebagai sama ada jaminan 'tidak bersyarat atas permintaan' atau jaminan 'bersyarat'. Jaminan 'tidak bersyarat atas permintaan' mewajibkan penjamin untuk membayar apabila dituntut tanpa bukti apa-apa kemungkiran dalam kontrak asal. Dalam jaminan 'bersyarat', beberapa kejadian dan kejadian-kejadian perlu berlaku sebelum satu tuntutan sah boleh dibuat untuk mewajibkan penjamin membayar di bawah terma-terma penjamin/bon pelaksanaan. Jawapan kepada sama ada instrumen undang-undang yang dituntut bersifat jaminan, bon atau indemniti terangkum di bawah salah satu dua kategori harus diputuskan daripada perkataan-perkataan yang digunakan dalam dokumen itu sendiri. Kesimpulan yang boleh dibuat daripada terma-terma perlu juga mengambil kira beberapa konteks praktikal dan juga tujuan komersil (lihat perenggan 19–21).

(3) Keperluan untuk mengemukakan atau melaporkan dengan tuntutan tidak semestinya menjadikan satu jenis jaminan itu 'jaminan bersyarat'. Terdapat ruang untuk jaminan menjadi jaminan yang boleh dituntut jika pun tuntutan tersebut diperlukan untuk menyokong sijil atau laporan (lihat perenggan 23 & 27).

(4) Dari segi bahasa, tona dan terma-terma yang digunakan atau dinyatakan dalam NG, adalah menjadi niat jelas pihak-pihak bahawa BG mempunyai kesan dan berfungsi sebagai jaminan boleh tuntut (lihat perenggan 28).

(5) Berikutan ujian-ujian yang dicadangkan dalam kes *Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd* [2012] 3 CLJ 401, ambang atau tahap keterangan yang perlu dipenuhi oleh plaintif untuk mewujudkan kesemua pengecualian sama ada penipuan atau ketidaksedaran, untuk membolehkan plaintif mendapat perintah sekatan terhadap defendan untuk menerima jumlah yang dijamin daripada HSBC di bawah terma BG, adalah sangat tinggi (lihat perenggan 35).

(6) Memandangkan laporan pemeriksaan yang disemak semula yang telah dikemukakan oleh defendan adalah laporan SGS dan secara spesifiknya merujuk kepada pelanggaran waranti-waranti, terdapat kepatuhan pada terma-terma BG untuk bayaran dibangkitkan. HSBC amat berhak untuk menganggap dokumen yang dikemukakan bagi tuntutan terhadap BG, pada dasarnya tanpa kewajipan untuk mengambil apa-apa siasatan lanjut (lihat perenggan 41).

(7) Fakta-fakta dan material yang dikemukakan di hadapan mahkamah tidak cukup untuk menggantikan balasan komersil yang memerlukan tujuan BG ditegakkan dan hak defendan untuk menguatkuasakan atau menunaikannya, untuk diguna pakai (lihat perenggan 42).]

Notes

For a case on bank guarantee, see 2(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 4862.

For cases on injunction to restrain, see 2(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 3555–3557.

For cases on interim injunction, see 2(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 3642–3730.

Cases referred to

ESSO Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd [1995] 1 MLJ 149; [1995] 1 CLJ 283, SC (refd)

Edward Owen Engineering Ltd v Barclays Bank International Ltd [1978] 1 All ER 976, CA (refd)

Esal (Commodities) Ltd and Reltor Ltd v Oriental Credit Ltd and Wells Fargo Bank NA [1985] 2 Lloyd's Rep 546 (consd)

Gold Coast Ltd v Caja de Ahorros del Mediterraneo (2001) EWCA Civ 1806, CA (consd)

IE Contractors Ltd v Lloyds Bank and Rafidain Bank [1990] 2 Lloyd Rep 496, CA (consd)

Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd [2012] 4 MLJ 1; [2012] 3 CLJ 401, FC (refd)

Teknik Cekap Sdn Bhd v Public Bank Bhd [1995] 3 MLJ 449, CA (refd)

AJ Yeoh (Fazleeza with him) (Shearn Delamore & Co) for the appellant.
Atma Singh (D R John with him) (Atma Singh Veriah & Co) for the respondent.

Varghese George J:

(ENCLOSURE 6)

[1] Under the terms of a contract, indentified as *Contract No Q–UK–1004–008–PTM-rev 1* dated 10 July 2010 ('the contract') the plaintiff

had agreed with the defendant (a company in Indonesia) to supply, install, test and commission two units of Spray Drying Plant for Non-Dairy Creamer (T-6000) for a contract value of USD6m.

[2] Collateral to the terms of the contract, 'HSBC' Malaysia Berhad (HSBC) at the request of the plaintiff had issued in favour of the defendant the *bank Guarantee No GTWE BTW 1009639 for USD600,000* dated 29 December 2010 ('the bank guarantee').

The purpose of the bank guarantee was stated to be:

> … *for the purpose of guaranteeing the payment in the occurrence of non-performance against the warranty and non delivery of equipment as specified* … in the Contract.

The 'warranty' intended to be covered by the bank guarantee was specifically identified therein as:

(a) process warranty; and

(b) mechanical warranty

[3] It was also provided for in the bank guarantee as follows:

> If the Customer fail to fulfill the warranty 1 & 2 as stated above, the Beneficiary shall entitled to claim and such claim shall be supported by either a surveyor report which issued by a Surveyor who is recognised worldwide such as SGS or Lloyd or a mutually agreed letter signed by both the Customer and the Beneficiary to substantiate the claim.

[4] The defendant by a letter dated 24 August 2012 (received by HSBC on 28 August 2012) made a claim or demand on HSBC for the whole of the guaranteed sum. The defendant together with that demand had submitted an SGS *inspection report No 072/1ND/I DA/I 11—12* (issued by PT SGS Indonesia) dated 6 August 012.

[5] This inspection report made reference to an explosion which had occurred on 25 June 2012 involving the spray dryer equipment manufactured by the plaintiff. *This inspection report did not any where therein, however, advert to any breach or non-fulfillment of either or both of the Process or Mechanical warranties under the contract*.

[6] The relevant inspection itself appeared to have only been carried out by the surveyors on 4 August 2012

[7] The plaintiff was alerted by HSBC to this demand made on the bank guarantee by the defendant. By *encl 6*, the plaintiff applied to the court on an urgent basis for certain restraining orders to be issued against the defendant.

[8] I dealt with the plaintiff's application on an ex parte basis on 25 September 2012 and granted until inter parte disposal of encl 6, orders restraining the defendant from enforcing or encashing the bank guarantee or in any way taking any further action in respect of the bank guarantee.

[9] The defendant was in effect restrained in the interim from receiving the guaranteed sum until the inter parte disposal of encl 6.

[10] Before the date fixed for the inter parte disposal of encl 6, the defendant however (as it would appear, at the request of HSBC), submitted a further or revised SGS inspection report, namely *inspection report No 72/IND/ID/VIII–12 rev 01* also dated 6 August 2012 ('the revised inspection report').

[11] The revised inspection report was in identical terms to the original SGS inspection report that was submitted to HSBC by the defendant *vide* defendant claim letter of 24 August 2012, *save for a further assertion* included within the category of *Remarks* therein, which was set out in the following manner:

> 4 We confirm that the Spray Dryer of Non-Dairy Creamer manufactured by Yorker Sdn Bhd under contract No Q-YK-1004-008-rev 1 dated 10 July 2010 has failed based on our visual survey to fulfill the Process Warranty and Mechanical Warranty.

[12] HSBC acknowledged that they had received this revised inspection report on 24 September 2012

[13] For the plaintiff, it was contended that the bank guarantee should be construed as a *conditional guarantee* and in this respect, it was argued, that the demand made by the defendant on HSBC on 24 August 2012 had not satisfied or fulfilled the specific condition required for any payment to be made thereunder. It was stated that the SGS inspection report submitted together with that demand had not referred or adverted to any breach of the process and/or mechanical warranties in any event.

[14] Counsel for the plaintiff urged the court to totally disregard the revised inspection report (which made reference to the non-fulfillment of the process and mechanical warranties) since, as submitted, this (revised inspection report) was non-existent at the time of the original demand. Relying on the decision in *Teknik Cekap Sdn Bhd v Public Bank Bhd* [1995] 3 MLJ 449, counsel argued that in any event the alleged 'condition' in the bank guarantee had to be strictly construed and the defendant was not entitled to receive any monies pursuant to the terms of the bank guarantee.

[15] It was counsel for the defendant's position however that HSBC was obliged to pay the guaranteed sum to the defendant upon a claim or demand being made together with a report by an internationally recognised surveyor such as SGS or Lloyd. This, it was submitted, was complied with and had now been further clarified with the *addendum* included in the revised inspection report tendered to HSBC. It was contended that there was no reason for the court to restrain the defendant any longer from receiving the proceeds under the bank guarantee.

[16] It was also highlighted by counsel for the defendant that HSBC themselves had considered the bank guarantee to be in the category of as *on demand* guarantee and that HSBC was further satisfied with the sufficiency of the revised inspection report, such as was necessary to release payment of the guaranteed sum to the defendant.

WHETHER TO EXCLUDE THE REVISED INSPECTION REPORT

[17] In respect of the preliminary issue taken that the court should wholly disregard the revised inspection report, I was of the view that *at the inter parte stage* of dealing with encl 6, the court had to address the situation as it stood currently. (Both parties were at liberty to and had in the interim filed affidavits on further material to be taken note of by the court.) The court was therefore not constrained from taking into consideration the contents of the revised inspection report.

[18] However, as regards the indication that HSBC was satisfied with the sufficiency of the revised inspection report tendered and was willing to pay the guaranteed sum, it was my view that this *was not* a material factor that was to bear any influence on the court's decision whether to allow, or rather extend, the restraining orders made against the defendant.

ON DEMAND GUARANTEE OR CONDITIONAL GUARANTEE

[19] Conventionally bank guarantees or performance bonds are categorised as either:

(a) an 'on demand unconditional' guarantee (also referred in some jurisdictions as 'first demand' guarantees); or

(b) a 'conditional' guarantee.

[20] The former imposed an obligation on the guarantor to pay upon a demand being made without proof of any default in the underlying contract. On the other hand, in the latter 'conditional' guarantee situation, usually some

A event or events had to happen before a valid demand could be even made to impose an obligation on the guarantor to effect payment under the terms of the guarantee/performance bond.

B **[21]** The answer as to whether a given legal instrument claimed to be in the nature of a guarantee, bond or indemnity fell into one of these two categories had to be in determined from the words employed within the document itself. The conclusion to be drawn from those expressed terms had also to give regard to the particular practical context as well as the commercial purpose, in each case.

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[22] This was an issue of contractual interpretation to discover the intention of the parties.

D **[23]** It was also recognised in law that a requirement to produce a certificate or report with a demand did not necessarily make that type of guarantee a 'conditional guarantee'. A distinction had to be drawn between the proof of facts (happening) of an event or the mere presentation of a document like a certificate/report, where stipulated as a pre-requisite to payment under the guarantee in question.

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Staughton LJ in *IE Contractors Ltd v Lloyds Bank and Rafidain Bank* [1990] 2 Lloyd Rep 496, noted this distinction when he observed:

> … there is a bias or presumption in favour of the construction which holds a performance bond to be conditioned upon documents rather than facts. But I would not hold the presumption to be irrebuttable, if the meaning is plain.

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(His Lordship's observation aforesaid was made with reference to the Court of Appeal decision in *Esal (Commodities) Ltd and Reltor Ltd v Oriental Credit Ltd and Wells Fargo Bank NA* [1985] 2 Lloyd's Rep 546) where Ackner LJ had said

G that the guarantee or performance bond had to be clearly made conditional, otherwise it would be inconsistent with the entire object of the transaction (instrument) to obtain prompt and certain payment.)

H **[24]** This distinction was further considered by the UK Court of Appeal in *Gold Coast Ltd v Caja de Ahorros del Mediterraneo* (2001) EWCA Civ 1806. It was held there that the instrument (when construed on its terms) could be an on demand guarantee (there referred as a first demand guarantee) notwithstanding the existence of an express condition for payment which

I required the production of a certificate (there a Lloyds' certificate) Tuckey LJ noted there:

> There is nothing unusual about such a condition in a first demand guarantee where often it is simply the contracting party who has to state that he is entitled to be paid the amount guaranteed in order to trigger payment.

[25] According to His Lordship, the certificate to accompany the demand there in that case was just to exercise the right to call and trigger payment and further suggested that the production of certificate was a measure of protection for the bank before payment is made. His Lordship went on to state there:

> They must pay on receipt of the Lloyds certificate. They can do so safely without having to be concerned with the underlying dispute.

[26] The instrument in question in that case was upheld to be a 'first demand' (on demand) guarantee notwithstanding the existence of a requirement that a certificate was to accompany the demand for payment.

[27] Our Supreme Court in *ESSO Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149; [1995] 1 CLJ 283 speaking through Peh Swee Chin SCJ used the terminology *a pure on demand guarantee* in the context of the performance bond there (at p 157 (MLJ); p 290 (CLJ)) where what was required to trigger payment was only a written demand. There was room therefore even in our law, in my assessment, for a guarantee to be still an on demand guarantee even if the demand was required to be supported by a certificate or report. Such a requirement did not make the guarantee any less an *on demand* guarantee, although for all intents and purposes it might not be a *pure on demand guarantee*.

[28] In my evaluation of the language, tenor and terms used or expressed in the bank guarantee in this instant case, I had no doubt that it was the clear intention of the parties (here HSBC and defendant, in particular) that the bank guarantee was to have the effect and operate as an on-demand guarantee. The *condition* (if one may term it so) attached to the demand to be made by the defendant was that the demand *was to be accompanied* by *either* the production of a report by SGS or Lloyd as to non-performance against the process or mechanical warranties/non-delivery of equipment as specified or a letter signed by both parties, presented together with the demand made on HSBC.

EXCEPTIONS TO STRICT COMPLIANCE OF on demand GUARANTEES

[29] I informed both counsel accordingly, that in my assessment, the bank guarantee was an *on demand* guarantee and referred them to the recent decision of the Federal Court in *Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd* [2012] 4 MLJ 1; [2012] 3 CLJ 401 which had dealt with the strict approach to be taken by the courts when dealing with cases revolving around 'on demand' guarantees or performance bonds.

[30] The Federal Court in *Sumatec Engineering*'s case reaffirmed the

autonomy principle which lay behind a bank guarantee, namely that it was a separate and independent contract and the banks should be left free to honour its contractual obligation, while the beneficiary, on the other hand, should not be unfairly restrained from either receiving the guaranteed sum (see *ESSO Petroleum*'s case). The commercial considerations that required such an approach was yet again reaffirmed in this decision.

The significance of the Federal Court's decision in *Sumatec*'s case was further that *unconscionability* (or unconscionable conduct on the part of the beneficiary) was endorsed as a further and distinct exception to that strict compliance to be accorded to the instrument and the consequent obligation on the guarantor to pay on demand. Hitherto the only recognised sole exception was as drawn from the decision in *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] 1 All ER 976 and the following dicta of Lord Denning there:

> A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contractual obligations or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions. *The only exception is when there is clear fraud of which the bank has notice*.

QUALITY OF EVIDENCE REQUIRED TO ESTABLISH THE EXCEPTIONS

[31] More significantly however, the Federal Court also clarified in *Sumatec* what was the *quality of evidence* required to establish a case for the exception of *unconscionable* conduct on the part of the beneficiary to be made out. The Federal Court endorsed the Court of Appeal's observation (in *Sumatec* itself) in respect of the burden to be met to establish either of the exceptions. That part of Court of Appeal's decision reproduced with approval by the Federal Court was in the following terms:

> As in the case of fraud, to establish 'unconscionability' there must be placed before the court manifest or strong evidence of some degree in respect of the alleged unconscionable conduct complained of, not a bare assertion. Hence, the Respondent *has to satisfy the threshold of a seriously arguable case that the only realistic inference is the existence of 'unconscionability'* which would basically mean establishing a *strong prima facie*. In other words, the Respondent has to place sufficient evidence before the court so as to enable the court to be satisfied, not necessarily beyond reasonable doubt, that a case of 'unconscionability' being committed by the beneficiary (the appellant) has been established to an extent sufficient for the court to be minded to order injunction sought. *This additional ground of 'unconscionability' should only be allowed with circumspect where events or conduct are of such degree such as to prick the conscience of a reasonable and sensible man*.

[32] In the statement of claim in this action, the plaintiff had further or in the alternative pleaded, that the defendant in making the demand on the bank guarantee … *had committed fraud on the plaintiff in that the defendant were aware that the call or demand … was false and uncalled for, and that, in any event, were reckless in not caring whether the claim or demand … was true or false*.

[33] In his further submission, counsel for the plaintiff presented a litany of the defendant's conduct which counsel termed as lacking in *bona fides* or good faith. Counsel equated these as *unconscionable conduct* as tantamount to taking unfair advantage, or was conduct of the defendant which was not consistent with equity or good conscience (that is, basically involving unfairness as distinct from dishonesty and fraud).

[34] Counsel for the defendant contended, *firstly* that there was no issue of any fraud having been established on good evidence by the plaintiff to have been allegedly committed by the defendant, especially now that the revised inspection report with the relevant addendum was in place. *Secondly*, it was also submitted that there was no circumstances shown by the plaintiff, based on which the plaintiff could say that there was a seriously arguable case where the only realistic inference to be made was the existence of *unconsionability* or *unconscionable conduct* on the part of the defendant.

[35] It was beyond doubt that, following the tests postulated in *Sumatec*'s case, the threshold or evidentiary level of proof required to be met by the plaintiff to avail of the exceptions of either fraud or unconscionability, to enable the plaintiff to sustain any restraining order on the defendant to receive the guaranteed sum from HSBC under the terms of the bank guarantee, was indeed a very high one.

[36] In my evaluation there were only two matters highlighted by plaintiffs' counsel that merited some consideration by the court in this regard.

[37] The *first* was that there was two SGS inspection reports of *the same date* and only in the one presented subsequently (the revised inspection report) was there an addendum which mentioned a breach of the process and mechanical warranties. The suggestion was that the defendant was admittedly post-facto covering up for an original inadequate report which did not conform with or support the claim made on the bank guarantee.

[38] The *second* was that even the revised inspection report which made reference allegedly to a 'breach' of the process and mechanical warranties, *on the face of it*, was purely made on the basis of a *visual survey* only. Further in another part of both the said inspection reports, it was acknowledged that *no instrument was used* by the persons making the survey and/or report.

[39] The suggestion here was that the tests apparently, carried out or conducted by SGS before arriving at their conclusion, did not involve any technical process or detailed assessment. The conclusions as appeared to have been reached by SGS, was done cursorily only while breach of the process or mechanical warranties required specific investigations, which had not been obviously undertaken.

[40] The question then before the court was, whether the plaintiff had in the circumstances discharged the burden that was on them to place before the court such manifest or strong evidence based on which it could be seriously argued that the only realistic inference to be drawn was the defendant had committed *unconscionable conduct* or fraud in respect of the demand or related to the underlying contract between the plaintiff and defendant, of which the HSBC had notice too.

[41] After having given anxious consideration to the matters raised by the plaintiff, I was not satisfied that the test or guidelines which had to be applied here had been met and discharged by the plaintiff. Since the *revised inspection report* produced by the defendant was an SGS report and referred specifically to breach of the process and mechanical warranties under the contract, there was compliance with the terms of the bank guarantee for payment to be effected. HSBC was perfectly entitled to treat the document presented in support of the demand on the bank guarantee, on its face value without any obligation to undertake any further investigation.

[42] The courts, in deciding upon whether or not to grant restraining orders (irrespective of whether it was against the guarantor or the beneficiary) involving on demand guarantees, have been enjoined to be always circumspect, having in mind particularly the balance that had to be drawn between, on the one hand, equitable considerations and on the other, commercial considerations. The commercial consideration required the court to uphold the integrity and autonomy of guarantee instrument unless, in the most exceptional of circumstances, a departure was justified on very persuasive evidence of fraud or unconscionability on the part of the beneficiary.

In this case, I was not convinced that the facts and material placed before me were sufficient to displace the commercial consideration that required the purpose of the Bank Guarantee to be upheld and the defendant's right to enforce or encash it, to prevail.

[43] Accordingly, for the reasons discussed and elaborated above, I proceeded to dissolve the ex parte restraining orders earlier made by me (and extended by ad interim order by consent meanwhile) in the matter.

[44] Counsel for the plaintiff thereupon informed that he had instruction to

appeal against my decision and a notice of appeal would be filed, shortly. He applied for an *Erinford* or *holding-over* order to be granted by the court pending disposal of the plaintiff's appeal.

[45] Despite objections to the said application taken by counsel for the defendant, I nevertheless allowed the *Erinford* order sought, that is in effect to maintain the restraining orders I had initially made on 25 September 2012 pending disposal of the appeal. I granted the *Erinford* order after having taken into consideration the particular fact here in this case, that the defendant (the beneficiary under the dank guarantee) was a party outside the jurisdiction of this court. If the guaranteed sum was released by HSBC to the defendant who was overseas, there was the real risk and resultant difficulty in recovering the sum paid out, in the event the plaintiff ultimately succeeded on their appeal against my decision.

[46] I held that this constituted 'special circumstances' in the factual context of this case, to allow a holding-over order pending appeal, as applied for by the plaintiffs.

Application allowed.

Reported by Kanesh Sundrum